NO. 2900.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a corporation, J. E. WOODS, and M. J. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

B. K. WHEELER,
JAMES H. BALDWIN,
Attorneys for Defendant in Error.

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STATEMENT OF FACTS.

This action was brought by David Clement, Sr., the father of David Clement, Jr., deceased, to recover damages which the plaintiff, as parent, suffered by reason of the death of his son.

The charging part of the complaint in substance charges and the evidence shows, David Clement, Jr.,

was on the 5th day of November, 1912, at about the hour of four o'clock a. m., driving a pair of horses and riding in an enclosed milk wagon which was drawn by said horses on Montana Street, a public street, in the incorporated City of Butte, toward and near the intersection of Railway Company's tracks and said street and was not observant of the approach of a train which was moving along said track in a westerly direction, said engine being under the control of J. E. Woods and M. J. Chappell; that said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and said Chappell did see David Clement, Jr., coming directly in the path of said engine, *and did see that said boy was in danger of being struck by said engine and that he was unobservant of the approach of said engine; that the defendant then, after so seeing the boy in danger, negligently drove and ran said engine against the vehicle on which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance and was drawn and dragged under the wheels of said engine and the same was then and there run and driven over him,* whereby he was crushed and injured from which injuries he thereafter died.

No question is here raised and none could be as to the right of the father to maintain the action.

> Haddox vs. Northern Pacific Ry. Co., 46 Mont., 185; 127 Pac. 152.

The facts in this case relative to the negligence of the defendants are the same as in the case of David Clement, as administrator of the estate of David Clement, Jr., vs. Chicago, Milwaukee & St. Paul Railway Company, reported in 226 Federal 426.

The same question was raised by the defendant in that case as in this with reference to the doctrine of concurrent negligence and the last clear chance, but unfortunately, was not passed upon by the Court. We presume, however, that the Court felt that it had laid down in Great Northern Railway Company vs. Harmon, 217 Fed. 959, where this court holds that a trespasser is entitled to the benefit of the doctrine of the last clear chance, the rule which would hereafter be followed in this district.

In Great Northern Ry. Co., v. Harman, (supra) the court says:

> "A cause of action arose in his favor, if the defendant actually knows of his peril and thereafter fails to exercise ordinary care to avoid injuring him; and the plaintiff's contributory negligence cannot defeat the action, if it can be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of that negligence."

The testimony shows that the father is a miner,

and that he has worked in the mines of Butte for 27 years. That the boy was 16 years of age and that he had been driving a milk wagon for three months. That before he went to work on the ranch he was living with his father. He was a strong healthy boy and had a "good feeling" towards his father, as expressed by his father (Tp. 26). Out of his first month's pay he gave his father Fifteen ($15.) Dollars. While he was working he came home to see he father. He quit school because he was ambitious to work. His mother is dead and the boy was being raised by his father.

Chappell who was one of the defendants, and on the train that struck the boy testified, "I saw the boy coming when I got to a point where the view was unobstructed, at a distance of about 330 or 340 feet. The train was going at "a little jog of a trot," about four miles an hour. I could see it was a covered wagon. The person in the wagon never made any attempt to stop but continued on same gain, the lines were slack. I gave the engineer one signal about 150 feet east of the crossing, may be a little more, it was a slow sign, and then when the wagon was about 75 feet away from the crossing he gave him signal to stop.

The engineer was obliged under the rules of the Company to obey any orders given him by Chappell. Chappell was riding on the rear end of engine looking out for obstructions. The engine was backing. The engineer could see practically the same distance as Chappell. They had twelve cars attached to the

engine with a tonnage of approximately 700 tons. The brakes had passed the car inspectors in the yards.

There is what is known as an angle cock at each end of an engine. When this is opened it has the effect of putting on the emergency, "When I gave the stop sign I made up my mind it was necessary to stop." The engine was not thrown into reverse.

"We went four car lengths and a half, and the engine and tender passed the crossing before the engine finally came to a stand still. The cars are 36 to 40 feet. There grade there is about one-half of one per cent."

Chappell was asked this question:

Q. I will ask you if it isn't a fact Mr. Chappell, that going at the rate of five miles an hour upon a track of the grade of the track of the Chicago, Milwaukee & Puget Sound at the place where the accident occurred, and for a distance of 150 feet east of it—if the air had been put on and the engine had been thrown into reverse, and the track sanded, if the engine hadn't ought to have been stopped in the distance of 25 feet, taking into consideration also the tonnage you had on this evening?

Q. First class condition?

A. Well, I imagine the stop could be made some where in that territory, in that neighborhood, anyway, under those conditions.

He further stated after some quibbling, that that train should have been stopped in from 25 to 40 feet.

There was an arc light over the crossing, and the rays extended for a block. The collision took place at four a. m.

W. J. McMaster testififed, that the emergency brake was not applied until the engine was on the crossing (Tp. 59-60).

L. S. Groff, who had followed railroading for a long time said in answer to a hypothetical question that the train should have been stopped going at the rate of six or eight miles in an hour in fifteen feet.

James A. Brittian, who had been engaged in railroading as an engineer for sixteen years and was familiar with the engine in question and had driven the engine for a year and who was also familiar with the grade stated, "The train in the morning in question should have been stopped in from twenty to twenty-five feet.

ARGUMENT.

The verdict of the jury was twenty-five Hundred Dollars. When a motion for a new trial was made the trial court cut the amount of the verdict to Fifteen Hundred Dollars.

In the case of Haddox v. Northern Pacific Railway Co., (supra) the verdict was for Eighteen Hundred Dollars, and the evidence did not show that the boy had contributed any money to his father.

The reported case, however, does not show these facts.

While the recovery in this case is limited strictly to the probable pecuniary loss suffered by the

father, the factors upon which the jury may base their estimate of damages are: decedent's age, health, habits, earning capacity, disposition to aid beneficiaries, the age and circumstances of the latter, and the aid actually rendered them during decedent's lifetime.

> Baltimore & Potomac Ry. Co. v. MacKey, 157 U. S. 72; 39 L. Ed. 624;
>
> Michigan Central v. Vreeland, 227 U. S. 59; 57 L. Ed. 417.

In the above cases expressions like these are used or cited with approval.

> "Nevertheless, the word 'pecuniary loss' as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife or child, * * * No hard and fast rule by which pecuniary damages may in all cases be measured is possible, * * * The rule for the measurement of damages must differ according to the relation between the parties plaintiff and decedent."

It is true that the boy had only given the father Fifteen ($15.) Dollars, out of his first month's wages, but the father who had worked and raised the boy by working in the mines for twenty-seven years in Butte could reasonably expect a steady boy to assist him in his old age.

In the case of Lundeen v. Great Northern Railway Company, 150 Northwestern Rep. 1088, the

Supreme Court sustained a verdict of Two Thousand Dollars, where the boy had given his father Ten ($10.00) Dollars out of his first month's wages.

In O'Malley v. St. Paul, M. & M. Ry. Co., 40 Minn. 289; 45 N. W. 440, a verdict of Three Thousand Dollars for the death of a six year old child was held not excessive.

The same amount for the death of a laborer's child six and one-half (6½) years old was sustained in Gunderson v. Northwestern Elevator Co., 47 Minn. 161; 49 N. W. 694.

See also—

Gray v. St. Paul City Ry. Co., 87 Minn. 280; 91 N. W. 1106;

18 Ann. cases, page 1225 for other cases;

Hutchins v. St. Paul, M. & M. Co., 44 Minn. 5; 46 N. W. 79;

Sieber v. Great Northern Ry. Co., 76 Minn. 269; 79 N. W. 95;

Swanson v. Oakes, 93 Minn. 404; 101 N. W. 949;

McVeigh v. M. & R. R. Ry. Co., 129 N. W. 852;

Hirschkovitz v. Penn. Ry. Co., 138 Fed. 438;

Hopper v. Denver & R. G. Ry. Co., 155 Fed. 273.

In view of these authorities we feel that the Court erred in reducing the verdict from Twenty-five Hundred to Fifteen Hundred Dollars, and that the verdict as it now stands is not excessive.

Counsel next urge that neither the pleadings nor the evidence justify a recovery by defendant in error.

We will first examine the pleadings:

In the case of Doichinoff v. C. M. & St. P. Ry. Co., (Mont. 1916) 154 Pac. 924, the same counsel represented the plaintiff and defendant and the pleading is almost in the identical language as will be seen.

The court says:

> "The complaint proceeds upon the theory of the last clear chance doctrine."

The charging part is as follows:

> "That they (the defendants) then after seeing that the said Chris Koleff, was in a place of danger, and that he was not aware of his danger negligently and carelessly failed to stop said engine, and said defendants negligently failed to sufficienetly warn the said Chris Koleff, of the approach of said engine, and negligently and carelessly permitted and allowed the said engine to coast along noiselessly and to strike said Chris Koleff, inflicting upon him grievous bodily injury, from which he died within a short time thereafter."

The Court further says:

"To state a cause of action within the doctrine of the last clear chance, it is necessary to disclose in the complaint:

(1) The exposed condition brought about by the negligence of plaintiff or the person injured.

(2) The actual discovery by defendant of the perilous situation of the person or property in the time to avert injury; and

(3) The failure of defendant thereafter to use ordinary care to avert the injury."

Dahmer v. Northern Pac. Ry. Co., 48 Mont. 156; 136 Pac. 1059; 142 Pac. 209.

"Preceding that portion of the complaint quoted above, discovery of Koleff's peril or the duty to discover it is charged in the alternative, and in this respect the pleading is undefinite; but in the absence of a reasonable attack by motion or special demurrer particularly pointing out the defect we think the allegations, taken as a whole, sufficient to state a cause of action and apprise the defendants of plaintiff's theory of his case."

Gauss v. Trump, 48 Mont. 92; 135 Pac. 910.

We repeat a casual examination of the two complaints drawn by same counsel are identical and should dispose of the contentions of defendant's counsel as to the sufficiency of the complaint.

SPECIFICATIONS IV TO IX.

Answering the argument of counsel for defendant upon his specification of error Numbers four and nine inclusive. We submit that no prejudicial error was committed, and we do not feel that counsel seriously contend that there was.

The first question asked in specification of error number four (4) was not leading and consequently the objection was properly overruled.

The second question did call for hearsay evidence but it was upon an immaterial matter, that would not tend to increase or decrease the verdict in this case.

It is improper to ask leading questions as well as to ask one calling for hearsay, but no court ever reversed a judgment because one or two leading questions were asked during the course of a trial, or because hearsay testimony was given upon an immaterial matter.

The question asked of Glover on cross-examination as to what was the first information he had respecting the boy, was clearly improper cross-examination, was irrelevant, immaterial and called for hearsay testimony, and the same is true of counsel's offer of proof in specification of Error Number Six. If the boy was sleeping in a barn and someone saw him it might even then be doubtful, as to whether without something more it would be competent. Possibly counsel for the defendant, unlike

counsel for plaintiff, has never enjoyed such an experience.

The question asked of the witness W. G. Ward, objected to and assigned as Specification Number Seven (7), called for hearsay testimony and was immaterial and the Court properly sustained the same.

We feel that specifications of error numbers Eight (8) and Nine (9) are not even worthy of comment further than what the Court said in sustaining the same.

No error was committed by the court in the reception or rejection of evidence.

EVIDENCE.

Coming now to an analysis of the evidence let us see if it does not come strictly within the rule as laid down by the Supreme Court of Montana, in the case of Doichinoff v. Chicago, Milwaukee & St. Paul Railway Company, (supra).

Chappell, the foreman of the crew testified: "The person in the wagon did not stop the team at any time; never made any stop. He did not attempt to make any stop. The team never slackened, and never showed any indications that there was any line pulled on them at all. I could see the lines after I * * * I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued

in that same gait all the time that I seen them, until the engine struck the wagon," (Tp. 33).

This evidence together with the evidence of his being struck by the engine shows,

(1) The exposed condition brought about by the negligence of the person injured.

Chappell, further says:

"When I gave the first signal to the engineer to slow up I was approximately 150 feet east of the crossing. When I gave the signal to stop, I was approximately 75 feet between 75 and one hundred feet from the crossing. (Tp. 37).

"When I gave him (referring to the engineer) the stop sign I made up my mind it was necessary to stop, and to help matters along took a kick at the angle cock, which would have the same effect as the brake valve, but I didn't get it open, and I got off." (Tp. 38).

The engineer of the train, J. E. Woods, corroborates Chappell as follows:

"The first time I appreciated the boy was in danger or the person with the team, if anybody, was in danger, was when I was 75 feet away from the crossing." (Tp. 71).

This shows conclusively that the deceased was actually discovered in a place of peril.

Now, Chappell, who at the time he gave his deposition which was introduced in evidence was working for the defendant testified further, that the train could have been stopped in from 25 to 40 feet.

L. S. Groff, who had been railroading for twelve

years testified in answer to a hypothetical question that the train going at six or eight miles an hour should be stopped in fifteen feet. (Tp. 61).

James A. Brittian, an engineer familiar with the engine and the track testified that it should have been stopped in twenty to twenty-five feet.

This taken in connection with Chappell's testimony, that he gave a stop signal to the engineer when the engineer was seventy-five feet from the crossing and Wood's testimony that he considered the boy or who ever was in the wagon in danger when the engine was seventy-five feet away makes out, to our opinion, as complete a case under the doctrine of the last clear chance as we have ever seen presented to a court.

McMasters who was on the rear end of the train as brakeman testified:

"I should judge the emergency brakes were put on that morning about at the crossing; the engine was about at the crossing when they were put on. I could tell that from the distance I went; from the distance it was. After we struck the crossing we past about—I don't just remember, but it must have been four or five car lengths by the crossing."

Showing that there was a failure to use ordinary care to avert the injury after discovery.

In Doichinoff v. Chicago, Milwaukee and St. Paul Railway Company (supra), the court further said:

> "It is true that there is not in this record any direct evidence that Koleff was actually discovered by the enginemen, in time to avoid

the accident, but the fact may be established by circumstantial evidence. If in this instance it had been made to appear that Koleff was walking upon the railroad track in broad daylight 200 feet or more in advance of Middleton's locomotive; that he apparently unaware of danger, that the view from the locomotive was entirely unobstructed, that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff, that the locomotive could have been stopped from ten to thirty feet considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him, even in face of the positive testimony of the enginemen that they did not see him at all until he was struck. In other words, a particular combination of circumstances may be more convincing that direct evidence whose probative force depends upon the veracity of witnesses more or less interested, while the case presented by the evidence before us is not so complete as in the supposititious case above, we think it sufficient to justify a verdict."

So in this case the fact that the engineer says that when he was 75 feet away he set the brakes and did all he could and yet did not stop until he was 125 feet passed the crossing the circumstances are such that a jury would be justified in not giving much credence to such positive testimony.

We have no quarrel with the case of Dahmer v. Northern Pacific Railway Company, 48 Mont. 152;

136 Pac. 1059, but the last word by the Supreme Court of Montana upon the doctrine of the last clear chance and upon the pleadings in such a case is contained in Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co., (supra).

Counsel for defendant call attention to the case of Southern Ry. Co. v. Carroll, 138 Fed. 638. It has no application to the facts in the case at bar and is cited, we believe, because it coincides with the ideas of counsel that a railroad has the first right to the use of the public streets.

The Supreme Court of Montana in the case of Walters v. Chicago, Milwaukee & St. P. Ry. Co., 133 Pac. 357, referring to the case of New York Central & H. R. Co., v. Maidment 168, Fed. 21; 93 C. C. A. 413; and Brommer v. Pennsylvania, 179 Fed. 577; 103 C. C. A. 135, said:

> "Both of the decisions just cited emanated from the Circuit Court of Appeals for the Third District, speaking through Judge Buffington, and they proceed upon the mistaken ideas that a railroad has some sort of a paramount right to the use of a public Highway crossing, and that whether a citizen using the highway on approaching such crossing must stop, look and listen depends upon the motive power he is using and its amenability to control; whereas the true rule, as we understand it, is that the citizen has an equal right with the railway company to use the crossing, and the amenability to control of motive power he is using bears more properly upon how near he may come to the place of

> danger before taking the precautions that common prudence generally requires. Of these cases nothing further need be said than this: If they are to be taken to hold, in the absence of express statute, that it is contributory negligence, as a matter of law, for the driver of an automobile not to stop, look and listen before using a highway crossing, without regard to whether ordinary prudence would require such a course, they are contrary in spirit to the rule announced by the Superior authority of the Supreme Court of the United States (Grant Trunk Ry. Co. v. Ives, 144 U. S. 408) 12 Sup. Ct. 679; 36 L. Ed. 845 * * *''

The argument of Counsel that the doctrine of the last clear chance cannot be invoked where the decedent is guilty of unexcessable negligence is rediculous in view of the decisions of the Supreme Court of Montana, and of every other Court for the reason that when you invoke the rule of the "last clear chance" you presuppose negligence on the part of the plaintiff or injured person, so here, admitting Clement was guilty of negligence the engineer saw him in a place of danger when he, the engineer, was 75 feet away and experts say he could have stopped in from fifteen to twenty-five feet and McMasters says, he did not put on the emergency brake until the engine was on the crossing.

The case of Powers v. Iowa Central Ry. Co., 136 N. W. 1049, is not in point for the reason that when the defendant discovered plaintiff in danger it was then too late to stop the car.

The Supreme Court of Montana has passed upon cases of this kind and recoveries have been upheld in the following cases:

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944;

Neavy v. N. P. Ry. Co., 41 Mont. 213; 110 Pac. 226;

Melzner v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146;

Doichinoff v. C. M. & St. P. Ry. Co., (Supra).

This court in the case of Great Northern Ry. Co. v. Harman, 217 Fed. 959, held that the question as to whether or not the defendant had the last clear chance to avoid the accident was one for the jury.

These cases definitely settle the law in this jurisdiction and it should not be necessary to call attention to numerous other decisions. True it is some courts have held differently and some hesitate to apply the rule in a proper case.

CONCURRENT NEGLIGENCE

We respectfully submit that the rule of concurrent negligence has nothing to do in the consideration of the case at bar. The complaint is based upon and the case was tried upon the theory of the doctrine of the last clear chance. It was alleged that the engineer and the foreman of the engine crew discovered the the deceased in a place of danger unobservant of the approach of the train. The evi-

dence introduced on the part of the plaintiff was abundant to show that the engineer and foreman did see the deceased while he was in a place of danger, and when they were 75 feet away from the crossing.

In the case of Yergy v. Hel. L. & Ry. Co., 39 Mont. 213; 102 Pac. 310, which is a case on all fours with the case at bar, the Supreme Court of Montana said:

> "We shall assume for the purpose of this decision, that Mr. Yergy, was negligent in placing himself in a situation of peril. It is not a violent inference that he was asleep in his buggy up to a moment just prior to the collision. The testimony of the motorman is, however, to the effect that he saw deceased, and appreciated his peril, when the car was 40 feet south of Lyndale Avenue. He then sounded the gong. Edgerton testified that the car was 50 to 100 feet from the crossing when the gong first sounded; while Bickel testified that he heard the sound when the car was 90 feet south of the crossing, and Mrs. Wise said she heard it when the car was 200 or 300 feet from the point of collision. Peterson testified that the speed of the car was 8 miles per hour, and plaintiff's testimony tended to show that going at that rate of speed the car could have been stopped in the space of 20 feet. This testimony, which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of last clear chance before the moment of collision."

It seems to us that further argument of the doc-

trine of the last clear chance in this brief would be a work of supererogation. Your Honors have most carefully considered it before and have followed the rule and most properly applied it many times. The cases heretofore cited lucidly explain the rule, if indeed any explanation, in this enlightened age, is needed. The whole trouble with counsel for plaintiffs in error seems to be that they cannot differentiate between cases in which the doctrine was never invoked or when invoked not sustained by proof, and the cases in which this Circuit and the Supreme Court of Montana have carefully expressed the rule, and correctly applied it. In this connection we beg leave to call the attention of the Court to the fact that counsel for plaintiffs in error merely cite a mass of cases from other jurisdictions that are not applicable.

In closing this subdivision of our brief we trust we may be pardoned for citing one more case, but it is such a complete answer to the argument of counsel for plaintiffs in error that we call it to your Honors' attention. It is:

> Teakle v. San Pedro L. A. & L. R. Co., 32 Utah 276; 90 Pac. 402; 10 L. R. A. (n. s.) 486.

In this case the facts were very similar to the case at bar; deceased was struck, fell under a car the engine was pushing and was crumpled up and crushed by the ash pan of the engine after the car passed over him. In commenting upon the claim

put forth by the railroad company the same as is done in this case, the deceased's contributory negligence precluded a recovery, the Supreme Court of Utah held that the doctrine of of last clear chance applied, saying:

> "When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent."

We have examined the cases cited by counsel for plaintiff in error. The point upon which most, if not all, of the cases cited by plaintiff in error, turn is that the negligence of plaintiff continued up to the very moment the injury was inflicted. In the case at bar, it can hardly be said for an instant that David Clement, Jr., was acting negligently during any portion of the time that he was being pushed along the track and was rolled and dragged along the ground and track, either in the wagon or when he fell out and was rolled and dragged by the wheels of the engine and later run over by the wheels of the engine that passed over his body, eventually killing him. It is negligence, in the authorities cited by the Supreme Court of Montana, and this court, ceased at the time he got upon the track and the concurrence ceased there. The engineer Woods, stated, that when he saw that there was a possibility the driver would not stop he threw the engine into emergency at a point distance 75 feet from the crossing. It is most respectfully submitted that the failure of the engineer to stop the train after he saw

Clement in a place of peril and the rushing down upon him with the train, colliding with the wagon, and shoving it 250 feet beyond the point of contact with the wagon, traveling 325 feet in all after discovery, where all acts of negligence which occurred after David Clement, Jr., was discovered in a place of peril, and the judgment should be affirmed.

The jury undoubtedly believe, as they had a right to believe, that the testimony by the witnesses for defendant in error was true, and that the train could have been stopped within fifteen or forty feet. As has been well said by an eminent trial judge before whom we have practiced, a jury does not have to believe a thing merely because someone has testified to it, and a jury should judge things not by some unknown or mysterious rule, but as men of common sense. So it is no wonder the jury preferred to believe the witnesses for defendant in error rather than those who testified that a train going at six miles an hour could not be stopped in less than 150 feet. A reading of many cases cited in the brief of this case will show that in hardly any instance was there such a thing as a claim that it took such a remarkable long distance in which to stop a train going at six miles an hour. In the case of Neary v. N. P. Ry. Co., 97 Pac. 946; 37 Mont. 461, in the course of the opinion the Supreme Court of Montana said:

> "This train consisted of nine cars and was about 600 feet in length. By the application of the air brake, such a train could be stopped

within 250 or 300 feet when going at the rate of 25 or 30 miles per hour. If going at the rate of 6 miles per hour, it could be stopped within a distance of 6 feet."

This train consisted of nine cars, and was about 600 feet in length, by the application of the air brake such a train could be stopped when going at the rate of 30 miles an hour within 300 or 350 feet and when going at the rate of six miles per hour, it could be stopped within a distance of six feet.

We respectfully submit that this appeal should be affirmed.

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Attorneys for Defendant in Error.

SERVICE of the above and foregoing Brief admitted and copy thereof received this.....day of May, A. D. 1917.

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Attorneys for Plaintiffs in error.